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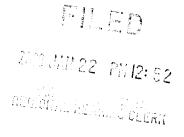
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Dalva L. Moellenberg (Ariz. Bar No. 010375) Jerald C. Thompson (Ariz. Bar No. 009324) GALLAGHER & KENNEDY, P.A. 2575 East Camelback Road Phoenix, Arizona 85016-9225

Tel: (602) 530-8000 Attorneys for Respondent

# UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION IX

In the Matter of:

AbTech Industries, Inc.,

Respondent.

Docket No. FIFRA-09-2008-0025

ANSWER AND REQUEST FOR HEARING

Respondent AbTech Industries, Inc. ("AbTech"), through undersigned counsel, hereby answers the Complaint in this case. AbTech's responses to each of the numbered paragraphs of the Complaint are set forth below:

## I. AUTHORITY AND PARTIES

- 1. Paragraph 1 of the Complaint requires no response.
- 2. AbTech is without sufficient information to admit or deny the allegations in Paragraph 2 of the Complaint.
  - 3. AbTech admits the allegations of Paragraph 3 of the Complaint.

#### II. GENERAL ALLEGATIONS

- 4. AbTech admits the allegations of Paragraph 4 of the Complaint.
- 5. In response to Paragraph 5 of the Complaint, AbTech admits only that it sold products known as "Smart Sponge Plus" in the period from April to November 2007 to persons in the United States and denies the remaining allegations of Paragraph 5.
- 6. In response to Paragraph 6 of the Complaint, AbTech alleges that to the extent any of the allegations are true, the products fell within the "treated articles" exemption contained in 40 C.F.R. § 152.25(a), or are otherwise not subject to regulation under FIFRA. AbTech denies the remaining allegations of Paragraph 6. AbTech affirmatively alleges that it consulted with employees at EPA who are knowledgeable regarding FIFRA, registration requirements under FIFRA, and the treated articles exemption. Those employees informed AbTech that its products would qualify for the treated articles exemption when sold, distributed and/or used for the purposes alleged in the Complaint.
- 7. AbTech is without sufficient information to respond to the allegations of Paragraph 7.
- 8. AbTech admits that the quoted definition of "pesticide" in Paragraph 8 is accurate.

- 9. In response to Paragraph 9, AbTech affirmatively alleges that the referenced products qualify for the "treated articles" exemption found in 40 C.F.R. § 152.25(a), or other exemptions, and denies the allegations of Paragraph 9.
- 10. AbTech admits the allegations of Paragraph 10. AbTech affirmatively alleges that the products complained of were not required to be registered under Section 3 of FIFRA, 7 U.S.C. § 136a.
  - 11. Paragraph 11 is a statement of law and does not require a response.

## III. ALLEGED VIOLATIONS

## COUNTS 1 - 9: Sale and/or Distribution of an Unregistered Pesticide

- 12. In response to Paragraph 12, AbTech incorporates its responses to Paragraphs 1 through 11 of the Complaint by reference.
- 13. In response to Paragraph 13, AbTech admits that it sold Smart Sponge Plus products to Hydrophix on or about the referenced dates and denies the remaining allegations of Paragraph 13.
  - 14. AbTech denies the allegations of Paragraph 14.

# COUNT 10: Sale and/or Distribution of an Unregistered Pesticide

15. In response to Paragraph 15, AbTech incorporates its responses to Paragraphs 1 through 11 of the Complaint by reference.

16. In response to Paragraph 16, AbTech admits that it sold Smart Sponge Plus products to Fire Prevention Services on or about the referenced date and denies the remaining allegations of Paragraph 16.

17. AbTech denies the allegations of Paragraph 17.

#### COUNTS 11 - 12: Sale and/or Distribution of an Unregistered Pesticide

- 18. In response to Paragraph 18, AbTech incorporates its responses to Paragraphs 1 through 11 of the Complaint by reference.
- 19. In response to Paragraph 19, AbTech admits that it sold Smart Sponge Plus products to Hydrophix on or about the referenced date and denies the remaining allegations of Paragraph 19.
  - 20. AbTech denies the allegations of Paragraph 20.

#### IV. PROPOSED CIVIL PENALTY

21. In response to Section IV of the Complaint, AbTech denies that the specified proposed civil penalty is appropriate under the circumstances and, if any alleged violations are proven, requests a hearing regarding full consideration of the relevant factors regarding a penalty assessment.

# V. NOTICE OF OPPORTUNITY TO REQUEST A HEARING

- 22. AbTech requests a hearing as provided in Section V of the Complaint.
- 23. AbTech denies all allegations of the Complaint not expressly admitted herein.

DATED this 21st day of January, 2009.

GALLAGHER & KENNEDY, P.A.

Dalva L. Moellenberg

2575 East Camelback Road

Phoenix, Arizona 85016-9225

Attorneys for Respondent

### **CERTIFICATE OF SERVICE**

I certify that on January 21, 2009, the original and one copy of the foregoing Answer and Request for Hearing was sent via overnight mail, fax, and via electronic mail to:

Danielle Carr Regional Hearing Clerk U.S. Environmental Protection Agency, Region IX 75 Hawthorne Street San Francisco, California 94105

and that a true and correct copy of the foregoing Answer and Request for Hearing was sent via overnight mail, fax, and via electronic mail to:

Edgar P. Coral Assistant Regional Counsel U.S. Environmental Protection Agency Region IX 75 Hawthorne Street San Francisco, California 94105

Dated: 1/21/09	By: Sarely M. Hedril
Dated: 1/21/09	By: arely M. Hedruh